Hongkong & Shanghai Banking Corp, The v Hj Salam bin Hj Daud (Mohd Azni bin Sudin, Auction Purchaser; RHB Bank Bhd, Intervenor)

HIGH COURT (KUANTAN) — ORIGINATING SUMMONS NO 31–123 OF 1986
RAMLY ALI J
4 JULY 2002

Civil Procedure *— Functus officio — Application to intervene after extraction of sealed order of court — Whether court functus officio — Whether intervenor entitled to intervene if court is functus officio — Whether order ought to be set aside — Rules of the High Court 1980 O 15 r 6(2)(b)(ii)*

This was an application by the intended intervenor, RHB Bank Bhd for leave that the intervenor be allowed to intervene under O 15 r 6(2)(b)(ii) of the Rules of the High Court 1980 ('the RHC'); and in the event leave be granted, for an order that the order of the court dated 18 November 1997 be set aside. The defendant had executed a third party first legal charge over a piece of land in favour of the plaintiff for a loan facility granted by the plaintiff to one Patra Sdn Bhd ('the borrower'). The borrower defaulted on the payment. The plaintiff filed an originating summons to foreclose the property. On 8 January 1992, in the absence of the defendant, the court granted an order for sale of the property and ordered that a public auction be held on 17 April 1992. On the auction date, the said land was sold to Mohd Azni bin Sudin ('the auction purchaser'). The defendant, meanwhile, had filed a private caveat on the said land on 31 January 1992. On 28 August 1992, Rakyat Merchant Bankers Bhd ('RMBB') entered into a loan agreement to grant credit facilities to one Foong Giap Group Sdn Bhd (later known as Fana Gading Group Sdn Bhd). The said loan agreement referred to three individuals, including the auction purchaser, who were supposed to charge their respective properties to RMBB by way of a third party first legal charge. However, RMBB entered a lien holder's caveat on 2 September 1992. The intervenor (RHB Bank Bhd) took over all the assets and liabilities of RMBB vide a vesting order dated 7 November 1996, including matters relating to the said loan agreement and lien holder's caveat. The order of 8 January 1992 was subsequently set aside by an order dated 18 November 1997. In the present application, the intervenor raised the following issues: (i) whether the court was functus officio; and (ii) if the court was not functus officio, whether the intervenor was entitled to intervene and whether the 18 November 1997 order ought to be set aside.

Held, dismissing the application with costs:

(1) The right to grant a lien holder's caveat belongs only to the registered proprietor of the property — in the present case, the registered proprietor being the auction purchaser. Only the

registered proprietor had the power or the right to deposit the title deed for the purpose of creating a lien holder's caveat (see p 492D–E); *Perwira Habib Bank (M) Bhd v Loo & Sons Realty Sdn Bhd* [1996] 3 MLJ 409 followed. There was no satisfactory evidence before the court to show that the auction purchaser had deposited his title with RMBB as a security for any loan to the auction purchaser. There was also no evidence before the court as to whether RMBB or its solicitor had written and obtained the consent from the auction purchaser for RMBB to have a lien holder's caveat over the said land. The court was of the view that the said RMBB's lien holder's caveat was therefore invalid in law (see p 493B, D–F).

(2) RMBB's lien holder's caveat was also invalid in law on the ground that the said caveat was registered on 2 September 1992, when in fact the defendant's private caveat had been registered earlier and was still in force. Section 322(2)(c) of the NLC expressly prohibited the entry of any lien holder's caveat over the land so long as there was private caveat in force (see p 493G).

(3) Although O 15 r 6(2) of the RHC stated that such an application could be made 'at any stage of the proceedings', this did not mean that such an application could be made after the final judgment or order had been entered and perfected (see p 495A); *Tai Choi Yu v Syarikat Tingan Lumber Sdn Bhd* [1998] 4 MLJ 275 followed. Order 15 r 6 of the RHC only applied to proceedings where the substitution of any of the parties to the cause or matter was made before the final judgment (see p 495B); *Shell Malaysia Trading Sdn Bhd v Leong Yuet Yeng & Ors* [1990] 3 MLJ 254 followed. It might be permitted at any stage of the proceedings. This meant it should be applied 'before the final order was made, not after it had been perfected and extracted' (see p 495C); *United Asian Bank Bhd v Personal Representative of Roshammah (decd) & Ors* [1994] 3 MLJ 327 followed.

(4) There did not exist any question or issue arising out of or relating to or connected with any relief or remedy claimed in the suit which remains to be determined between the plaintiff and the defendant and the intervenor. The plaintiff's action had been adjudicated upon, the action had been determined by the court (see p 495E–F).

(5) The intervenor's intention was to enforce their purported lien over the said land and in order to enforce the judgment obtained against Fana Gading and the guarantors. The intervenor had not secured any judgment against the auction purchaser under the purported lien holder's caveat. The intervenor had no direct legal interest in the subject matter of the proceedings, only commercial interest. A mere commercial interest did not entitled the intervenor to intervene (see pp 495H–496A); *Tohtonku Sdn Bhd v Superace (M) Sdn Bhd* [1992] 2 MLJ 63, *Moser v Marsden* [1892]

A 1 Ch 487 and *re IG Forbenindustrie AG* [1944] 1 Ch 41 followed.

(6) It must be noted that the 18 November 1997 order was final and binding on all parties. To allow the intervenor to intervene would mean to ask the court to reopen and relitigate the issues. The B auction purchaser had been added as party prior to the order. The mere fact that the auction purchaser did not participate in the proceedings or that the intervenor had not been informed of the proceedings by the auction purchaser did not alter the legal position as notice to the auction purchaser was binding on the intervenor (see p 496E–H) *Hock Hua Bank Bhd v Sahari bin* C *Murid* [1981] 1 MLJ 143 and *Badiaddin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 2 CLJ 75 followed. There had to be finality of litigation and the principle of issue estoppel and res judicata clearly applied given the circumstances of this case (see p 498A).

D (7) It was submitted by the intervenor that the defendant was estopped from objecting to the intervenor's application to intervene since the defendant had knowledge of the intervenor's lien holder's caveat. The defendant entered his private caveat on 27 May 1992 and even at the point of time the defendant filed the application to set aside the 8 January 1992 order, the E defendant could not possibly have been aware of the intervenor's alleged interest in the said land for the simple reason that the intervenor's lien holder's caveat was entered on 2 September 1992 (see p 499B–C).

(8) The intervenor had failed to provide sufficient evidential material F before the court to show that the intention and the conduct of the parties, particularly that of the auction purchaser, that he intended to create a lien holder's caveat in respect of the said land. In the circumstances, the court was of the view that the intervenor had no equitable charge over the said land (see p 499H–I).

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[Bahasa Malaysia summary

Ini merupakan sebuah permohonan oleh bakal pencelah, RHB Bank Bhd untuk kebenaran supaya pencelah dibenarkan untuk mencelah di bawah A 15 k 6 (2)(b)(ii) Kaedah-Kaedah Mahkamah Tinggi H 1980 ('KMT'); dan sekiranya kebenaran diberikan, untuk mendapatkan perintah supaya perintah mahkamah bertarikh 18 November 1997 diketepikan. Defendan telah menyempurnakan satu gadaian sah pertama pihak ketiga ke atas sebuah tanah di atas nama plaintif untuk satu kemudahan pinjaman yang diberikan plaintif kepada Patra Sdn Bhd ('peminjam tersebut'). Peminjam tersebut I telah mengingkari pembayaran. Plaintif telah memfailkan satu saman pemula untuk menghalang tebus hartanah tersebut. Pada 8 Januari 1992, dalam ketiadaan defendan, mahkamah telah memberikan satu

perintah untuk penjualan hartanah tersebut dan memerintahkan supaya satu lelongan awam diadakan pada 17 April 1992. Pada tarikh lelongan tersebut, tanah tersebut telah dijual kepada Mohd Azni bin Sudin ('pembeli lelongan'). Defendan, sementara itu, telah memfailkan satu kaveat persendirian ke atas tanah tersebut pada 31 Januari 1992. Pada 28 Ogos 1992, Rakyat Merchant Bankers Bhd ('RMBB') telah memasuki perjanjian pinjaman untuk memberikan kemudahan-kemudahan kredit kepada Foong Giap Group Sdn Bhd (kemudiannya dikenali sebagai Fana Gading Group Sdn Bhd). Perjanjian pinjaman tersebut merujuk kepada tiga orang individu, termasuk pembeli lelongan, yang sepatutnya menggadaikan hartanah-hartanah mereka masing-masingnya kepada RMBB melalui gadaian sah pertama pihak ketiga. Walau bagaimanapun, RMBB telah memasuki satu kaveat pemegang lien pada 2 September 1992. Pencelah tersebut (RHB Bank Bhd) mengambilalih kesemua aset-aset dan tanggungan RMBB melalui perintah perletakhakan bertarikh 7 November 1996, termasuk perkara-perkara berkaitan dengan perjanjian pinjaman tersebut dan kaveat pemegang lien. Perintah 8 Januari 1997 kemudiannya diketepikan oleh satu perintah bertarikh 18 November 1997. Dalam permohonan semasa, pencelah tersebut telah membangkitkan isu-isu yang berikut: (i) sama ada mahkamah adalah functus officio; dan (ii) jika mahkamah bukan functus officio, sama ada pencelah berhak untuk mencelah dan sama ada perintah 18 November 1997 haruslah diketepikan.

Diputuskan, menolak permohonan tersebut dengan kos:

(1) Hak untuk memberikan kaveat pemegang lien terletak hanya kepada tuanpunya berdaftar hartanah tersebut — dalam kes semasa, tuanpunya berdaftar merupakan pembeli lelongan. Hanya tuanpunya berdaftar mempunyai kuasa atau hak untuk mendepositkan hak milik bagi tujuan mewujudkan kaveat pemegang lien (lihat ms 492D–E); *Perwira Habib Bank (M) Bhd v Loo & Sons Realty Sdn Bhd* [1996] 3 MLJ 409 diikut. Tidak terdapat keterangan yang meyakinkan di hadapan mahkamah untuk menunjukkan bahawa pembeli lelongan telah mendepositkan hak milik beliau dengan RMBB sebagai jaminan untuk sebarang pinjaman kepada pembeli lelongan tersebut. Tidak juga terdapat sebarang keterangan di hadapan mahkamah berhubung dengan sama ada RMBB atau peguamcaranya telah menulis dan mendapatkan kebenaran daripada pembeli lelongan untuk RMBB memasukkan kaveat pemegang lien ke atas tanah tersebut. Mahkamah berpendapat bahawa kaveat pemegang lien RMBB tersebut adalah dengan itu tidak sah di sisi undang-undang (lihat ms 493B, D–F).

(2) Kaveat pemegang lien RMBB adalah juga tidak sah di sisi undang-undang atas alasan bahawa kaveat tersebut telah didaftarkan pada 2 September 1992, sedangkan pada hakikatnya

A kaveat persendirian defendan telah didaftarkan lebih awal dan masih berkuatkuasa. Seksyen 322(2)(c) KTN secara nyatanya melarang kemasukan sebarang kaveat pemegang lien ke atas tanah tersebut asalkan terdapat kaveat persendirian yang masih berkuatkuasa (lihat ms 493G).

B (3) Meskipun A 15 k 6(2) KMT tersebut menyatakan bahawa permohonan yang sedemikian boleh dibuat 'at any stage of the proceedings', ini tidak bermakna bahawa permohonan sedemikian boleh dibuat selepas penghakiman muktamad atau perintah telah dimasukkan dan disempurnakan (lihat ms 495A); *Tai Choi Yu v Syarikat Tingan Lumber Sdn Bhd* [1998] 4 CLJ 293
C diikut. Aturan 15 k 6 KMT tersebut hanya terpakai kepada prosiding di mana penggantian mana-mana pihak kepada kausa atau perkara tersebut dibuat sebelum penghakiman muktamad (lihat ms 495B); *Shell Malaysia Trading Sdn Bhd v Leong Yuet Yeng & Ors* [1990] 3 MLJ 254 diikut. Ianya mungkin dibenarkan di mana-mana peringkat prosiding tersebut. Ini bermakna
D bahawa ianya mestilah dipakai 'before the final order was made, not after it had been perfected and extracted' (lihat ms 495C); *United Asian Bank Bhd v Personal Representative of Roshammah (decd) & Ors* [1994] 3 MLJ 327 diikut.

(4) Tidak terdapat sebarang persoalan atau isu yang berbangkit
E daripada atau berhubung dengan atau berkaitan dengan mana-mana relif atau remedi yang dituntut dalam guaman tersebut yang kekal untuk ditentukan antara plaintif dan defendan dan pencelah tersebut. Tindakan plaintif telah dihakimi, tindakan tersebut telah ditentukan oleh mahkamah (lihat ms 495E–F).

F (5) Niat pencelah ialah untuk menguatkuasakan lien mereka yang dimaksudkan ke atas tanah tersebut dan demi untuk menguatkuasakan penghakiman yang diperolehi terhadap Fana Gading dan penjamin-penjamin. Pencelah tersebut telah tidak mendapatkan sebarang penghakiman terhadap pembeli lelongan di bawah kaveat pemegang lien yang dimaksudkan. Pencelah
G tersebut tidak mempunyai kepentingan sah secara langsung dalam hal perkara prosiding tersebut, hanya kepentingan komersial. Kepentingan komersial sahaja tidak memberikan hak kepada pencelah tersebut untuk mencelah (lihat ms 495H–496A); *Tohtonku Sdn Bhd v Superace (M) Sdn Bhd* [1992] 2 MLJ 63, *Moser v Marsden* [1892] 1 Ch 487 dan *re IG Forbenindustrie*
H *AG* [1944] 1 Ch 41 diikut.

(6) Harus diperhatikan bahawa perintah 18 November 1997 tersebut adalah muktamad dan mengikat kesemua pihak. Untuk membenarkan pencelah mencelah, akan bermaksud meminta mahkamah membuka semula dan melitigasikan semua isu-isu
I tersebut. Pembeli lelongan tersebut telah dimasukkan sebagai satu pihak sebelum perintah tersebut. Hakikat semata-mata bahawa pembeli lelongan tidak menyertai dalam prosiding

tersebut atau bahawa pencelah telah tidak dimaklumkan mengenai prosiding tersebut oleh pembeli lelongan tidak mengubah kedudukan undang-undang kerana notis kepada pembeli lelongan adalah mengikat pencelah tersebut (lihat ms 496E–H) *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 dan *Badiaddin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 diikut. Haruslah terdapat kemuktamadan litigasi dan prinsip isu estopel dan res judicata jelas terpakai memandangkan keadaan kes ini (lihat 498A).

(7) Adalah dihujahkan oleh pencelah tersebut bahawa defendan diestopkan daripada membantah permohonan pencelah untuk mencelah oleh kerana defendan mengetahui tentang kaveat pemegang lien pencelah tersebut. Defendan telah memasukkan kaveat persendirian beliau pada 27 Mei 1992 dan meskipun pada waktu itu defendan telah memfailkan permohonan untuk mengenepikan perintah 8 Januari 1992, defendan tidak mungkin telah mengetahui mengenai kepentingan pencelah yang dikatakan di dalam tanah tersebut hanya kerana kaveat pemegang lien tersebut telah dimasukkan pada 2 September 1992 (lihat ms 499B–C)

(8) Pencelah tersebut telah gagal untuk memberikan bahan keterangan yang mencukupi di hadapan mahkamah untuk menunjukkan bahawa niat dan perlakuan pihak-pihak tersebut, khususnya niat dan perlakuan pembeli lelongan tersebut, bahawa beliau berniat untuk mewujudkan satu kaveat pemegang lien berhubung dengan tanah tersebut. Dalam keadaan tersebut, mahkamah berpendapat bahawa pencelah tersebut tidak mempunyai gadaian ekuiti ke atas tanah tersebut (lihat ms 499H–I).]

Notes

For cases on functus officio generally, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2421–2437.

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189 (refd)

Badiaddin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393 (folld)

Chia Ah Sng v Hong Leong Finance Ltd [2001] 1 SLR 591 (refd)

Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143 (folld)

IG Forbenindustrie AG, re [1944] 1 Ch 41 (folld)

Mahadevan & Anor v Manila & Sons (M) Sdn Bhd [1984] 1 MLJ 266 (refd)

Moser v Marsden [1892] 1 Ch 487 (folld)

Perwira Habib Bank (M) Bhd v Loo & Sons Realty Sdn Bhd [1996]

A 3 MLJ 409 (folld)
Perwira Habib Bank Malaysia Bhd v Megat Najmuddin Megat Khas & Ors [1999] 5 MLJ 334 (refd)
Peter P'Chient v Ramasamy Chetty (1923) 3 FMSLR 220 (refd)
Sanders Lead Co Inc v Entores Metal Brokers Ltd [1984] 1 WLR 452 (refd)
B *Shell Malaysia Trading Sdn Bhd v Leong Yuet Yeng & Ors* [1990] 3 MLJ 254 (folld)
Tai Choi Yu v Syarikat Tingan Lumber Sdn Bhd [1998] 4 MLJ 275 (folld)
Tohtonku Sdn Bhd v Superace (M) Sdn Bhd [1992] 2 MLJ 63 (folld)
C *United Asian Bank Bhd v Personal Representative of Roshammah (decd) & Ors* [1994] 3 MLJ 327 (folld)
Woon Kim Poh v Sa'amah bte Hj Kasim [1987] 1 MLJ 400 (refd)
Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor [1975] AC 581 (refd)

D **Legislation referred to**

National Land Code 1965 ss 5, 218(1), 257(i)(c), 281(1), 322(2)(c)(4), (5), (6), 331(4)
Rules of the High Court O 15 r 6(2)(b)(ii), O 83 rr 2(4), 3(d)

Vignesh Kumar (*Balendran Chong & Bodi*) for the plaintiff.
E *Ramesh Ranghvi* (*Kassim Tadin Wai & Co*) for the defendant.
PS Mutty (*Mura Raju & Co*) for the auction purchaser.
LK Chow (*Lee Hishamudin*) for the intended intervenor.

Ramly Ali J: This is an application by the intended intervenor, RHB Bank Bhd ('the intervenor'), vide encl 124 for leave that the intervenor be allowed
F to intervene in the proceedings under O 15 r 6(2)(b)(ii) of the Rules of the High Court 1980 ('the RHC'); and in the event leave is granted, for an order that the order of this court dated 18 November 1997 which set aside an earlier order of this court dated 8 January 1992, be set aside.

The grounds of the said application are essentially as follows:

G (i) that the intervenor is the holder of a lien holder's caveat and an equitable charge over the land in question;

(ii) based on (i), the intervenor has a legal interest in the subject matter of the proceedings;

(ii) that the intervenor was not aware of the defendant's application to set
H aside the earlier order dated 8 January 1992;

(iv) that the 18 November 1997 order has affected the intervenor's interest in the said land; and

(v) that the 18 November 1997 order is invalid in law.

I *Factual matrix*

The defendant had executed in favour of the plaintiff, The Hongkong & Shanghai Banking Corporation ('HSBC') a third party first legal charge

over a piece of land held under CT 1817, Lot 597, Mukim Mentakab, for a loan facility granted by the plaintiff to one Patra Sdn Bhd ('the borrower'). The borrower defaulted in its payment. The plaintiff then filed an originating summons on 28 August 1986 to foreclose the property. The said originating summons was renewed three times. The plaintiff's notice of appointment to hear the originating summons that first came up for hearing on 13 August 1990 was adjourned four times, and on the fifth date (8 January 1992), in the absence of the defendant, the court granted the order for sale (the 8 January 1992 order) and ordered that a public auction be held on 17 April 1992 ('the auction date'). As at 8 January 1992, the court's records revealed that no affidavit of service to show that the adjourned notice of appointment to hear the originating summons on 8 January 1992 had been served on the defendant; and no supplementary affidavit giving particulars of the account in accordance with O 83 r 3 of the RHC. The plaintiff's summons for directions came up for hearing on 30 January 1992 and the plaintiff obtained the relevant directions for sale, and the reserved price was RM240,000. On the auction date (17 April 1992), the said land, was sold to the bidder, Mohd Azni bin Sudin ('the auction purchaser') for RM240,100 ie RM100 above the reserved price (the said auction purchaser has been added as a party to the proceedings). The said land was then registered in the auction purchaser's name on 4 May 1992 (ie within 20 days of the auction date on 17 April 1992).

The defendant then filed an application dated 9 July 1992 (encl 45B) seeking various reliefs, inter alia, to set aside the 8 January 1992 order and included an order that the auction purchaser be added as a party to the proceedings. The defendant's application (encl 45B) was served on the auction purchaser on 9 August 1992. On 12 August 1992, the judge granted an order, inter alia, that the auction purchaser be added as a party to the proceedings. There were numerous affidavits filed by the plaintiff and the defendant in respect of encl 45B namely:

(i) plaintiff's affidavits — encll 49B, 52A, 59A;

(ii) defendant's affidavits — encll 47A, 51A.

The defendant filed an application on 4 March 1997 (encl 95A) to amend encl 45B in accordance with the directions given by the judge on 5 February 1997. The judge directed counsel for the plaintiff and defendant to file in written submissions together with bundles of authorities. The application came up for disposal on 27 August 1997 before the judge and after considering the various affidavits and submissions by both counsel and the authorities, the judge reserved his decision. On 18 November 1997, the judge granted the defendant various orders, inter alia, an order that the earlier order for sale (dated 8 January 1992) and the public auction (dated 17 April 1992) be set aside.

In supporting the said application, the defendant raised numerous issues in his written submissions as well as oral submissions on 27 August 1997. The gist of the defendant's main contention was that the 8 January 1992 order was a nullity on the grounds:

(i) that the plaintiff had not served the notice of of adjourned hearing on the defendant in breach of O 83 r 2(4) of the RHC; and

(ii) that as at 8 January 1992, there was no affidavit of particulars of the account in accordance with O 83 r 3(d) of the RHC and ss 257(i)(c) of the National Land Code 1965 ('the NLC').

The plaintiff appealed to the Court of Appeal against the 18 November 1997 order by filing a notice of appeal on 17 December 1997. On 18 June 1998, the plaintiff filed a notice of motion in the Court of Appeal for an extension of time to file and serve the appeal records. The plaintiff's notice of motion came up for disposal on 31 January 2000 and the Court of Appeal dismissed the said notice after hearing submissions from both counsel. There was no further appeal by the plaintiff against the Court of Appeal's order of dismissal dated 31 January 2000.

Meanwhile, the defendant had filed a private caveat on the said land on 31 January 1992.

The basis of the intervenor's lien holder's caveat on the said land entered on 2 September 1992

Rakyat Merchant Bankers Bhd ('RMBB') entered into a loan agreement dated 28 August 1992 to grant credit facilities to one Foong Giap Group Sdn Bhd (later known as Fana Gading Group Sdn Bhd). The said loan agreement refers, inter alia, to three individuals who were supposed to charge their respective three properties to RMBB by way of a third party first legal charge and this included Mohd Azni Sudin (the auction purchaser). In addition, there were three other individuals (the directors of Fana Gading) who were supposed to be the guarantors. However, instead of a third party first legal charge over the said land, RMBB entered a lien holder's caveat on 2 September 1992 (notwithstanding that at that point of time the defendant's private caveat of 27 May 1992 was already on the land register). The intervenor (RHB Bank Bhd) took over all the assets and liabilities of RMBB vide a vesting order dated 7 November 1996, including matters relating to the said loan agreement and lien holder's caveat.

In the present application before this court (vide encl 124), the intervenor raised the following issues:

(i) whether this court was functus officio; and

(ii) if the court rules in favour of the intervenor, ie that the court was not functus officio:

(a) whether the intervenor was entitled to intervene; and

(b) whether the 18 November 1997 order ought to be set aside.

When the present application came up for hearing on 27 February 2002, the counsel for the auction purchaser indicated that he would adopt the submissions made by the defendant's counsel. The counsel for the plaintiff on the other hand indicated that she was supporting the present application made by the intervenor. Basically, this court is only dealing with the relevant affidavits and submissions by the defendant and the intervenor.

Findings of the court

Before this court deals with the issues posed by the intervenor, this court ought to consider the question of whether the RMBB lien holder's caveat dated 2 September 1992 has any basis in law in the light of the relevant provisions of the NLC.

Section 281(1) and (2) of the NLC reads as follows:

> (1) Any proprietor or lessee for the time being may deposit with any other person or body, as security for a loan, his issue document of title or, as the case may be, duplicate lease and that person or body:
>
> (a) may thereupon apply under Chapter 1 of Part Nineteen for the entry of a lien-holder's caveat; and
>
> (b) shall, upon the entry of such a caveat, become entitled to a lien over the land or lease.
>
> (2) Where the holder of any lien has obtained judgment for the amount due to him thereunder, he shall be entitled to apply to the court for, and obtain forthwith an order for sale of the land or lease.

Section 281(1), in very clear language, provides that only a proprietor of alienated land or a lessee may deposit his respective issue document of title or duplicate lease as the case may be. The word 'proprietor' is defined in s 5 of the NLC as 'any person or body for the time being registered as the proprietor of any alienated land'. In other words, the right to grant a lien holder's caveat belongs only to the registered proprietor of the property (in the present case, the auction purchaser). It is not possible for a third party (eg the borrower) with whom the document of title has been deposited to be able to create a lien holder's caveat in favour of another third party (eg the bank). In *Perwira Habib Bank (M) Bhd v Loo & Sons Realty Sdn Bhd* [1996] 3 MLJ 409, the Court of Appeal reiterated the principle that only the registered proprietor had the power or the right to deposit the title deed for the purpose of creating a lien holder's caveat. Kamalanathan Ratnam J in *Perwira Habib Bank Malaysia Bhd v Megat Najmuddin Megat Khas & Ors* [1999] 5 MLJ 334 also shared the same sentiment on the same issue. At p 523, in dealing with the provisions of sub-ss (1) and (2) of s 281 of the NLC, he said at p 342:

> Based on these two sub-sections, the right to grant a lien holder's caveat over property belongs only to the registered proprietor or lessee of the said property. It is not possible for a third party such as the plaintiff in this case with whom the original document of title has been deposited for some other purpose, to be able to create a lien holder's caveat in favour of the third party, or the plaintiff in this case.

It is incumbent upon the intervenor to prove that the proprietor's act of depositing the document of title was made on the advance of money. The intervenor must connect the deposit of the title made between the proprietor (the auction purchaser) and RMBB with the advance. The intervenor must prove the true intention of the proprietor when the title was deposited by the proprietor with RMBB. In this context, the court is in full agreement with the learned author SY Kok in his article: *The Nature and*

Application of The Torrens Liens and Lien-Holders' Caveats in West Malaysia, MLJ (January 1983) p xi when he said (at p lii):

> In other words, the holder must show that the deposit was made as security for a loan advanced by the holder to the depositor — proprietor. If the deposit is for any reason other than 'as security for a loan', the act of depositing cannot be construed as being connected with a loan or advance and therefore no valid lien could, under the circumstances, be validly created under s 281(1).

In the present case, RMBB had granted a loan facility to Fana Gading and not to the auction purchaser, Mohd Azni Sudin. There is no satisfactory evidence before this court to show that the auction purchaser had deposited his title with RMBB as a security for any loan to the auction purchaser. The intervenor's affidavit affirmed on 4 August 2000 merely referred to a loan agreement between RMBB and Fana Gading. The mere possession of an issue document of title is not proof of an intention to deposit the title as security for a loan where the origin of the possession is not explained by the intervenor and no evidence is adduced to connect the deposit with the loan advanced. There will be no such deposit as to create a lien under s 281(1) of the NLC. There is also no material whatsoever before this court for the basis upon which RMBB proceeded to create a lien holder's caveat over the said land instead of a third party first legal charge over the said land. In addition, there is also no evidence before this court as to whether RMBB or its solicitors had written to and obtained the consent from the auction purchaser for RMBB to have a lien holder's caveat over the said land. The consent of the proprietor is essential to enable RMBB to create a lien holder's caveat over the said land. This requirement has been stressed by Watson JC sitting in the Court of Appeal in the case of *Peter P'Chient v Ramasamy Chetty* (1923) 3 FMSLR 220 at p 227. In that case, Watson JC also held that 'the Torrens sections creating the Torrens liens or statutory liens should be read with the greatest strictness and be strictly construed and applied, or else the security of tenure of land which the Torrens statutes seek to set up would be seriously undermined'.

On the strength of the above consideration, this court is of the view that RMBB's lien holder's caveat is therefore invalid in law (see also *Perwira Habib Bank Malaysia Bhd v Megat Najmuddin Megat Khas & Ors*.

RMBB's lien holder's caveat is also invalid in law on the ground that the said caveat was registered on 2 September 1992, when in fact the defendant's private caveat had been registered on 27 May 1992 and was still in force. Section 322(2)(c) of the NLC expressly prohibits the entry of any lien holder's caveat over the land so long as there is private caveat in force. The relevant provisions of s 322(2)(c), (4) and (5) read as follows:

> (2) The effect of any private caveat expressed to bind the land itself shall, subject to sub-ss (4) and (5), be to prohibit so long as it continues in force the registration, endorsement or entry on the register document of title thereto of:
>
> (c) any lien-holder's caveat in respect thereof.
>
> (4) A private caveat shall not prohibit the registration, endorsement or entry of any instrument, claim or lien holder's caveat where the instrument was

presented, or the application for endorsement or entry received, prior to the time from which the private caveat takes effect.

(5) A private caveat shall not prohibit the registration or endorsement of any instrument or claim where:

(a) the instrument was presented or the application for endorsement made by the person or body at whose instance the caveat was entered; or

(b) the said instrument or application was accompanied by the consent in writing of that person or body to its registration or, as the case may be, to the making of the endorsement.

In *Woon Kim Poh v Sa'amah bte Hj Kasim* [1987] 1 MLJ 400, Hashim Yeop A Sani SCJ, sitting in the Supreme Court held (at p 402):

> Under s 322 of the National Land Code, so long as a caveat is in force, registration, endorsement or entry on the register document of title of any instrument of dealing shall be prohibited. The effect of a private caveat expressed to bind the land itself is to prevent any registered disposition of the land except with the caveator's consent until the caveat is removed.

At the same page, he went on to say:

> In the Torrens system where registration is the very basis of the system, the prohibition in s 322(2) must be strictly complied with. In other words, the registrar is statutorily obliged to refuse the registration because to do so would be a violation of an expressed provision of the National Land Code.

In fact, under s 322(6) of the NLC, the registrar is required to reject the lien holder's caveat where there is a private caveat in force. Section 331(4) of the NLC further provides that the court, if satisfied that any lien holder's caveat ought not to have been entered, may order the cancellation thereof by the registrar.

Can the intervenor intervene at this stage of the proceedings under O 15 r 6(2) of the RHC?

The intervenor's written submission is to the effect that it has a right to intervene at this stage of the proceedings, even though the 18 November 1997 order had been perfected. The intervenor relied on O 15 r 6(2)(b)(ii) of the RHC which reads as follows:

> At any stage of the proceedings in any cause or matter, the court may on such terms as it thinks just and either on its own motion or on application.
>
> ...
>
> (b) order any of the following persons to be added as a party, namely:
>
> ...
>
> (ii) any person between whom and any party to the cause or matter there may exist a question 'or issue arising out of or relating to or connected with any relief or remedy claimed. In the cause or matter which in the opinion of the court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.

A Although O 15 r 6(2) states that such an application could be made 'at any stage of the proceedings', this does not mean that such an application can be made after the final judgment or order has been entered and perfected. This principle was decided by the Court of Appeal in the case of *Tai Choi Yu v Syarikat Tingan Lumber Sdn Bhd* [1998] 4 MLJ 275. In another case, *Shell Malaysia Trading Sdn Bhd v Leong Yuet Yeng & Ors* [1990] 3 MLJ 254, B the court held that O 15 r 6 only applies to proceedings where the substitution of any of the parties to the cause or matter is made before the final judgment. In that case, the application was made after the judgment had been finalized. It is stated in *United Asian Bank Bhd v Personal Representative of Roshammah (decd) & Ors* [1994] 3 MLJ 327 at p 335:

C > 'Intervention, to be legitimate must qualify with the conditions prescribed by O 15 r 6(2)(b)(i) or (ii) of the Rules of the High Court 1980. It may be permitted at any stage of the proceedings. This means it must be applied for before the final order is made, not after it has been perfected and extracted.'

In the present case, the 18 November 1997 order was finalized and D perfected. The plaintiff's notice of motion to extend the time to file and serve the appeal records has been dismissed by the Court of Appeal on 31 January 2000; and there is no further appeal by the plaintiff against the said decision. The proceedings have been concluded. Therefore, it is not appropriate for the court to invoke O 15 r 6(2) of the RHC to grant leave to the intervenor to intervene at this stage of the proceedings.

E Another ground to show that O 15 r 6(2) of the RHC is not applicable to the present application is that there does not exist any question or issue arising out of or relating to or connected with any relief or remedy claimed in the suit which remains to be determined, between the plaintiff, the defendant and the intervenor. The plaintiff's action against the defendant F had been adjudicated upon, and the action has been determined by the court.

In *Gula Perak Bhd v Varghese Mathai* [1988] 3 MLJ 358, the court, in dismissing an application by the applicant to be added as a party to that proceeding, held (at p 358):

G > For there to be jurisdiction to add ... as a party, it has to be established that there is a question or issue to be tried as between the applicant and one of the existing parties in the petition, and that the question or issue arises out of or relates to or is connected with any relief or remedy claimed in the petition. The court further has to be satisfied that it would be just and convenient for the question or issue to be determined as between the intervenor and that party and between the existing parties to the petition.

H In the present case, the intervenor's intention in intervening is in essence an exercise to enforce their purported lien over the said land and in order to enforce the judgment obtained against Fana Gading and the guarantors. It must be noted that to date, no legal proceedings have been commenced by the intervenor against the auction purchaser. In short, the intervenor has I not secured any judgment against the auction purchaser under the purported lien holder's caveat. The intervenor has no direct legal interest in the subject matter of the proceedings. The intervenor has only a commercial

interest. A mere commercial interest does not entitle the intervenor to intervene. The intervenor, after having obtained judgment against Fana Gading and the guarantors, and the fact that the judgment has not been satisfied, is now seeking relief against the auction purchaser instead.

In *Tohtonku Sdn Bhd v Superace (M) Sdn Bhd* [1992] 2 MLJ 63, the Supreme Court held at p 65:

> It is settled law, on the authorities, that a party may be added if his 'legal interests' will be affected by the judgment in the action but not if his commercial interest alone would be affected.

In *Moser v Marsden* [1892] 1 Ch 487 and in *re IG Forbenindustrie AG* [1944] 1 Ch 41, it was held that a party may be added if his legal interest may be affected by the judgment, but not if his commercial interest only would be affected. Their Lordships, in both cases, agreed that the mere fact that a person was likely to be better off financially if a case was decided one way rather than another was not a sufficient ground to entitle him to be added as a party.

In another case — *Sanders Lead Co Inc v Entores Metal Brokers Ltd* [1984] 1 WLR 452, the Court of Appeal held that a person had to have an interest directly related to the subject matter of an action before he is entitled to intervene in the action under O 15 r 6(2)(b)(ii) of the RHC; a mere commercial interest in the outcome of the action, divorced from its subject matter, such as interest of a creditor of one of the parties, was not sufficient to entitle a person to intervene.

Issue of functus officio and res judicata

The court is of the view that to allow the intervenor to intervene at this stage of the proceedings with a view to set aside the 18 November 1997 order will tantamount to asking the court to reopen and relitigate the very issues that have already been determined by the court after full and proper deliberation by the judge and after the judge had considered all the affidavits and submissions of both the plaintiff and the defendant. It must be noted that the 18 November 1997 order is final and binding on all parties. This court has no jurisdiction to set aside the 18 November 1997 order, bearing in mind that the auction purchaser had been added as a party prior to the 18 November 1997 order being granted, and the auction purchaser had notice of the proceedings and therefore this notice binds the intervenor as well. The mere fact that that the auction purchaser did not participate in the proceedings, or that the intervenor's contention that they had not been informed of the proceedings by the auction purchaser does not in any way alter the legal position as notice to the auction purchaser is binding on the intervenor. The intervenor's submission that the court was not functus officio and the reliance on *Black's Law Dictionary* on the meaning of the words 'functus officio' to suggest that the court has not yet completed the 'original commission' was misplaced. In the present case, the court completed the 'original commission' when the court granted the 18 November 1997 order. The plaintiff's appeal to the Court of Appeal against the 18 November 1997 order has come to an end, and hence there is

A nothing further for this court to adjudicate on with respect to the validity of the said order. In allowing the intervenor to intervene and to set aside the said 18 November 1997 order would also tantamount to allowing the intervenor to obtain a conflicting decision in respect of identical issues which have already been determined and adjudicated by the court after full arguments.

B The general principles on the rule on functus officio have been laid down by the Federal Court in *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 where it was held at p 144:

> ... the court had no power under any application in the same action to alter, vary or set aside a judgment regularly obtained after it had been entered, or an
C order after it has been drawn up, except under the slip rule [O 28 r 11 of the Rules of the Supreme Court 1957 (O 20 r 11 of the RUles of the High Court 1980)], so far as is necessary to correct errors in expressing the intention of the court ..., unless it is a judgment by default or made in the absence of a party at a trial or hearing. But if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the
D original hearing is forthcoming, a fresh action will be to impeach the original judgment.

In that case, the Federal Court held that the judge was functus officio and therefore had no jurisdiction to set aside his own order and the original order must be restored, leaving it to the respondent to take out a fresh action
E to set aside the order on the ground of fraud. In the more recent Federal Court case of *Badiaddin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 (which was presided by five Federal Court judges), it was held, inter alia, that at p 409:

> It is settled law that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. [The] one
F special exemption to this rule is where the final judgment of the High Court can be proved to be null and void on the ground of illegality or lack of jurisdiction.

From both the cases (*Hock Hua Bank Bhd* dan *Badiaddin bin Mohd Mahidin*) it can be stated that the exceptions to the general principle that
G the court has no power to alter, vary or set aside a judgment regularly obtained after it has been entered and drawn up, are as follows:

(i) the slip rule under O 20 r 11 of the RHC;

(ii) where an order has been made by default or made in the absence of a party at the trial or hearing;

H (iii) where the order has been obtained in breach of the rules of natural justice;

(iv) where the order had contravened a substantive statutory prohibition so as to render the order defective on grounds of illegality or lack of jurisdiction;

I (v) where in exceptional cases where the justice of the case requires the court to intervene and correct an earlier order that contains a serious defect and there is a need to have it set aside.

In our present case, the intervenor's case does not fall within any of the above mentioned exceptions and hence the principle of functus officio precludes this court from allowing the intervenor in its attempt to set aside the 18 November 1997 order. There has to be finality of litigation and the principles of issue estoppel and res judicata clearly apply given the circumstances of this case.

In the Supreme Court case of *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189, Peh Swee Chin FCJ said (at p 197):

> What is res judicata? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel *per rem judicatum*. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth: *res judicata pro veritate accipitur*. The public policy of the law is that, it is in the public interest that there should be finality in litigation — interest *rei publicae ut sit finis litium*. It is only just that no one ought to be vexed twice for the same cause of action — *nemo debet bis vexari pro eadem causa*. Both maxims are the rationales for the doctrine of res judicata, but the earlier maxim has the further elevated status of a question of public policy.

In *Chia Ah Sng v Hong Leong Finance Ltd* [2001] 1 SLR 591, the Singapore High Court held at p 592:

> The doctrine of finality, which is the doctrine of res judicata, states that an adjudicated matter cannot be readjudicated. It applies where a judgment has been regularly entered on a thing or matter after final adjudication on its merit by a tribunal of final result having competent jurisdiction on the subject matter of the litigation. A given decision cannot be revisited even though it is overruled subsequently by a higher court.

In *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor* [1975] AC 581, Lord Kilbrandon, speaking for the Privy Council, declared by referring to the doctrine of res judicata at p 590:

> There is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings.

Correctness of the decision or judgment is irrelevant to the doctrine of res judicata. On this issue, I would like to quote a relevant passage from *The Doctrine of Res Judicata* by Spencer Bower, Turner and Handley, (3rd Ed 1996) at para 189 which says:

> It is not necessary to prove that the decision relied on is correct in law or fact: if it is a final decision, by a tribunal having jurisdiction as to the same question, and between the same parties, it will be binding on them, until upset on appeal. Res Judicata ... gives effect to the policy of the law that the parties to a judicial decision should not afterwards be allowed to relitigate the same question, even though the decision may be wrong. This rests on the fact that a competent tribunal has jurisdiction to decide wrongly, as well as correctly, and if it makes a mistake, its decision is binding unless corrected on appeal.

A Applying the above principles and authorities to the facts of the present case, the court is satisfied that this court is functus officio in dealing with the present application by the intervenor and that the doctrine of res judicata applies. Therefore the intervenor's application to intervene and to set aside the 18 November 1997 order (as in encl 124) must fail.

B *Issue of knowledge*

It has been submitted by the intervenor that the defendant had knowledge of the intervenor's lien holder's caveat and hence the defendant is estopped from objecting to the intervenor's application to intervene.

C At the point of time, the defendant entered his private caveat on 27 May 1992 and even at that point of time, the defendant filed the application to set aside the 8 January 1992 order (encl 45B), the defendant could not possibly have been aware of the intervenor's alleged interest in the land for the simple reason that the intervenor's lien holder's caveat was entered on 2 September 1992. On the contrary, it is more than evident that RMBB had D expressed knowledge of the defendant's private caveat at the time RMBB's lien holder's caveat was presented for registration, and yet RMBB had chosen not to take any steps to set aside the defendant's private caveat in order to protect their interests, if any.

E *Issue of RMBB as an equitable chargee*

The intervenor also submitted that the intervenor has an equitable charge merely on the premise that the document of title in respect of the said land was deposited with RMBB.

F There is no evidential material before this court as to how RMBB got custody of the said document of title, and hence RMBB cannot contend that RMBB has an equitable charge. There is also no evidential material before this court as to whether the auction purchaser had even executed any charge documents over the said land in favour of RMBB and as to the reason if any, for the non-presentation of the charge documents at the land G office registry.

On the question of whether the intervenor has an equitable charge, the case relied on by the intervenor, *Mahadevan & Anor v Manila & Sons (M) Sdn Bhd* [1984] 1 MLJ 266 (at p 271) had laid down the following test:

> H Whether or not these transactions created an equitable charge depends upon the intention and conduct of the parties at the time when the payments were made.

In the present case, the intervenor failed to provide sufficient evidential material before this court to show that the intention and the conduct of the parties, particularly that of the auction purchaser, that he intended to create I a lien holder's caveat in respect of the said land. In the circumstances, this court is of the view that the intervenor has no equitable charge over the said land.

Conclusion

Based on the above considerations, this court finds that:

(i) this court is functus officio in dealing with the present application by the intervenor (vide encl 124) and the doctrine of res judicata applies;

(ii) there is no legal basis for the intervenor to be allowed to intervene at this stage of the proceedings;

(iii) the 18 November 1997 order is valid in law and binding on all parties; and shall not be set aside.

Therefore, the intervenor's application (vide encl 124) is dismissed with costs.

Order accordingly.

Reported by Zahid Taib